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**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING
IN HIGHER EDUCATION AND THE PROFESSIONS**

34th ANNUAL NATIONAL CONFERENCE

***“STRUGGLE FOR RESOURCES: A JOINT
MANAGEMENT/LABOR CHALLENGE”***

HUNTER COLLEGE

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“Annual Legal Update”

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INTRODUCTION

The daily work of representatives of labor and management is carried out against the often shifting background of legal decisions and legislation. Decisions by state and federal courts, labor boards, arbitrators, and administrative agencies, as well as the deliberations of elected officials, shape the world of labor relations by providing a set of ground rules under which the parties operate.

These decisions may affect the scope of collective bargaining, the rights and responsibilities of union organizers, the relationship between state and federal law, and the expanding panoply of individual employee rights.

In compiling this year's legal update, we look especially at recent decisions from the National Labor Relations Board, issues of federal preemption and same sex marriage cases.

I. NATIONAL LABOR RELATIONS BOARD AND RELATED CASES

A. The Bush Board

The National Labor Relations Board remained stable over the past year in terms of Board members and is currently at full strength. The full Board still holds a Republican majority and the current members with their party affiliation and term expiration dates are:

Peter Schaumber (R)	Confirmed for second term that will expire on August 27, 2010
Wilma Liebman (D)	Reappointed to a third term this past year. Term expires August 27, 2011
Robert Battista (Chair) (R)	Term expires 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. Unit Cases

In *Point Park University v. NLRB*, 457 F.2d 42 (D.C. Cir, 2006), the Court remanded a case to the Board because neither the Regional Director nor the Board followed the Court's guidance on the question of managerial status¹, nor did they adequately explain why the faculty's role at the University was not managerial in nature. While the Court was prepared to be "deferential" to the Board on the issue of managerial status, "we cannot be deferential, however, where the Board fails to adequately explain its reasoning." In this case, the Board did not explain its reasoning to the satisfaction of the Court. While both the Regional Director and the Board filled up many pages of factual findings and referred to many *Yeshiva* elements, they did not explain "which factors are significant and which less so, and why" in their determination that the faculty at Point Park were not managerial. The closest the Regional Director came was a conclusory statement that Point Park's "faculty... undoubtedly has an important consultative role but based on the record developed, it cannot be concluded that they exercised such plenary, absolute or effective authority or control to warrant their exclusion from the protection of the Act as managers." The Court found this an inadequate substitute for "fact-specific analysis called for by *Yeshiva* and *Lemoyne-Owens*."

In *Columbia College and Illinois Education Association (IEA)*, 346 NLRB No. 69 (2006), the Illinois Education Association (IEA) represented a unit of Columbia College's part-time faculty, and sought to represent a unit of full-time and regular part-time staff employees working in 72 different academic and administrative departments at the private University. The Board conducted an election pursuant to the parties' Stipulated Election Agreement. Of the approximately 422 eligible voters, 138 cast ballots in favor of the Union and 158 cast ballots against representation. In addition, there were sixty challenged ballots, a number sufficient to affect the results of the election. Much of the dispute revolved around the votes and representation of approximately twenty-four non-student tutors in the English department's writing center and approximately twelve non-student tutors in the math and science department's learning center. Eleven writing center tutors and five learning center tutors voted in the election but were challenged because their names did not appear on the *Excelsior* list.

All of the math and science departments' learning center tutors and most of the English department's writing center tutors held part-time faculty positions in their respective departments in addition to their tutoring jobs. All of the tutors work a part-time schedule in their respective centers and are hired on a semester-by-semester basis and as a matter of practice have been rehired for each following semester if they wish to continue tutoring. Writing center tutors are supervised by a non-faculty staff supervisor,

¹ As expressed in the Court's decision in *Lemoyne-Owen College v. NLRB*, 357 F. 3d 55 (D.C. Cir., 2004).

while the learning center tutors are supervised by a part-time faculty member who also holds a tutoring position. Employees in both centers apply separately to work as tutors, and their tutoring work is not a requirement of their part-time faculty positions. Tutors work regularly scheduled hours in their respective centers and receive two separate paychecks, one for teaching and one for tutoring; however, tutoring work is compensated at a much lower rate than teaching. Tutors in the learning center may occasionally see students from their classes during their tutoring hours while tutors in the writing center do not tutor their own students.

Columbia filed objections with the NLRB arguing that all of the challenged voters were ineligible based on three factors: (1) the individuals were ineligible tutors, (2) the employees were either managerial or supervisors, and (3) the employees were ineligible for various specific reasons. Columbia argued that the tutors were not eligible to vote because they were excluded from the unit under the “faculty” and “independently contracted tutors” exclusions or because they were dual-function employees covered by a current collective-bargaining agreement and they did not spend at least 50 percent of their time performing tutoring work.

The hearing officer recommended that 42 of the 60 ballot challenges be overruled and recommended sustaining an objection which alleged that the Employer failed to supply a complete *Excelsior* list. The hearing officer recommended, in part, that the challenges to the tutors’ ballots be overruled because the tutors did not fall within the Stipulated Election Agreement’s exclusion of “independently contracted tutors” from the unit. In so finding, the hearing officer applied the Board’s independent contractor test and determined that the learning center and writing center tutors were not independent contractors within the meaning of Section 2(3) of the Act, but rather were statutory employees of the college, and had a community of interest with the other staff employees based on similar job functions, wage rates, lack of benefits, and a lack of evidence in the record that the tutors do not have a community of interest with the other staff employees. In addition, the hearing officer found that part-time faculty members holding part-time tutoring positions were not dual-function employees because they had separate and distinct employment relationships for each position. He concluded that, as tutors, they had a community of interest only with the part-time staff employees. However, to the extent that these tutors were considered to be dual-function employees, the hearing officer found that they had a sufficient community of interest with the other staff employees to permit their inclusion in the unit.

The National Labor Relations Board agreed with the hearing officer’s recommendation to overrule Columbia’s challenges to the ballots and that the Employer failed to provide sufficient evidence to show that these employees were either excluded supervisors or ineligible managerial employees. Further, the Board agreed with the hearing officer that the “independently contracted tutors” exclusion did not apply to the challenged tutors and that the “faculty” exclusion did not apply to individuals holding both a faculty position and an included position. In adopting the hearing officer’s recommendation, the Board noted that the hearing officer’s analysis was consistent with *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002). In applying the *Caesar’s Tahoe* test, the

Board opined that the term “independently contracted tutors” was open to differing reasonable interpretations, which could not be resolved by reference to the language of the stipulated election agreement alone. The Board therefore looked to the second prong of *Caesar’s Tahoe* to infer that the parties intended to give the words “independently contracted” the meaning used by the Board and the courts in related contexts. The Board stated that under general principles of contract interpretation, technical terms and words of art are given their technical meaning unless the context or usage which is applicable indicates a different meaning. The Board determined that the hearing officer correctly found that the parties intended to exclude those who met the test for independent-contractor status, as defined by both the Board and the courts because the record contained no evidence that the parties intended the term “independently contracted” to be given anything other than its technical meaning.

The Board next found that the Stipulated Election Agreement’s exclusion of “faculty” was also ambiguous and therefore looked for other evidence of the parties’ intentions, as required by *Caesar’s Tahoe*. Because the record contained no evidence of the parties’ intent in crafting the exclusion, general principles of contract interpretation did not resolve the issue, and there was nothing in law which would suggest that an employee who holds two positions, one included in a stipulated unit and one excluded from that unit, must as a matter of law be excluded from the unit, the Board looked to the community-of-interest test. In doing so, the Board found that employees holding both an otherwise eligible staff position and a part-time faculty position were properly included in the unit, despite some differences between the dual-function employees and most staff employees. The Board found a similar community of interest because these employees, when working their non-faculty positions, were paid hourly wages comparable to other staff employees, like other staff received no benefits, worked specific and limited schedules like other staff employees, worked under separate supervision from faculty, and performed non-classroom teaching functions.

The Board noted that an employee with job responsibilities encompassing more than one position is generally considered a dual-function employee. According to the Board, the touchstone of dual-function employee status is the fact that a single employee performs multiple job functions covered by one or more of the employer’s job classifications. Here, the Board stated that the tutors who also held part-time faculty positions fell squarely within the scope of the Board’s traditional definition of dual-function employees. The Board then concluded that the dual-function employees were eligible to vote in the stipulated unit, as determined by a variant of the Board’s traditional community-of-interest test. The Board noted that it has long held that employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. The Board agreed with the hearing officer’s determination that the dual-function tutors had a community of interest with the employees in the stipulated unit. Further, Columbia, as the party seeking to exclude the tutors, failed to present sufficient evidence to prove that the tutors did not have a community of interest with the staff unit.

The Board further determined that the stipulated bargaining unit did not include any classifications covered by the existing part-time faculty collective-bargaining agreement. To the contrary, the stipulated bargaining unit excluded faculty positions which were covered by that agreement. The dual-function tutors' job duties as part-time faculty were separate and independent from their duties as tutors. Instead of holding a single, integrated job with responsibilities spanning multiple classifications and potentially multiple collective-bargaining agreements, their duties as faculty and as tutors were contained within their separate and independent positions. Accordingly, the part-time faculty collective-bargaining agreement did not bar the inclusion of part-time faculty employees holding part-time tutoring positions in the petitioned-for staff unit.

In *Pace University*, 349 NLRB 10 (2007), the Board found that the University committed an unfair labor practice by not bargaining with the certified union over certain disputed adjunct faculty members. In 2004, the AFT was certified as the representative of a unit of "all adjunct faculty members, part-time instructors, and all adjunct faculty members and part-time instructors who work in a non-supervisory dual capacity for the Employer," excluding, inter alia, "casual employees." In setting up the election, the Regional Director set forth the following voter eligibility criteria: "Eligible to vote in the election are those in this unit who have received appointments and teach or have taught at least 3 credit hours and/or 45 hours in any semester in any of two academic year during the three year period commencing with the 2001-02 academic year and ending with the 2003-04 academic year."

When bargaining began, a dispute arose between the University and the Union over the inclusion in the unit of some adjuncts. The University contended that only those who met the voter eligibility guidelines should be recognized as unit members. The University contended that an adjunct faculty member does not become a unit member until he or she has taught three credits and/or 45 hours in a semester in two of the three preceding three academic years, including the current year. The Union contended that any faculty member who taught three credits and/or 45 hours in one semester should be in the unit. After a unit clarification petition was filed, the Regional Director agreed with the union. The University continued to refuse to bargain over such adjuncts and, hence, the Administrative Law Judge and the Board found the University in violation of Section 8 (a)(1) and (5).

C. Work Place Rules

As discussed in previous years at this conference, an important area of recent Board decisions 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.

By way of brief background, in 2004, the Board had issued a major decision in this area. 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 abuse were lawful ways of maintaining order in the workplace and did not chill 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 *explicitly* 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.

Since 2004, other decisions have dealt with work place rules in light of this case. *Guardsmark, LLC*, 344 NLRB 97 (2005); *Double Eagle Hotel & Casino*, 414 F. 3d 1249 (10th Cir, 2005).

In February of this year, the aforementioned *Guardsmark* case came up for review before the D.C. Circuit. In the decision below, the Board had held that two workplace rules – one requiring that employees register their complaints only through the chain of command and the other barring solicitation – violated the NLRA. The Board found that a third rule barring “fraternization” was lawful because the Board thought employees would not reasonably interpret it to interfere with protected activities. The union (SEIU, Local 24/7) challenged this ruling, and the company challenged the ruling on the other two rules. The Court upheld the Board ruling that the chain of command rule and the solicitation rule were illegal, and, in addition, it agreed with the union that this fraternization rule was also illegal. *Guardsmark, LLC v. NLRB*, 2007 WL 283455 (DC Cir., 2007).

Guardsmark is a company providing security guard services to clients. The fraternization rule in question stated that “while on duty, you must NOT fraternize on duty or off duty, date or become friendly with the client’s employees or with co employees. The Board had found that nothing in this rule ran afoul of the Act. Observing that the rule lists “fraternize” next to two terms referring to romantic relationships among employees – “date” and “become overly friendly” – the Board concluded that “employees would reasonably understand the rule to prohibit only personal entanglements rather than activity protected by the Act.”

The Court did not think that the “neighborhood” approach on words that the Board used held any water. The Court said that a reasonable employee would look at the rule and believe that the word “fraternize” held some independent meaning other than “dating” or “becoming overly friendly.” Quoting *Merriam Webster’s Collegiate Dictionary*, 10th edition, the Court noted that “fraternize” is defined as meaning “to associate or mingle as brothers or on fraternal terms.” It found similar definitions in five other dictionaries and ultimately concluded that “employees would reasonably interpret the rule to prevent them from discussing terms and conditions of employment. In other words, we find unreasonable the Board’s conclusion that employees would understand the rule to prohibit only personal entanglements rather than activity protected by the Act.”

D. Definition of “Supervisor” under the NLRA

The NLRA excludes supervisors from its coverage. Section 2 (11) of the Act defines a supervisor as:

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This definition has been a source of hundreds of cases over the years as the Board sorts out representation questions.

Certainly one of the lead decisions from the past year from the Board was *Oakwood Health Care, Inc.* 348 NLRB No. 37 (Sept. 29, 2006). This decision represents the Board’s latest thinking on how supervisory status should be interpreted for professional employees. In question was the status of certain charge nurses and whether or not they should be included in a unit of all registered nurses at Oakwood Heritage Hospital in Taylor, Michigan.

The Board handled this case following a consideration of amicus briefs from many parties on both sides of the issue in light of the Supreme Court’s decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). In *Kentucky River*, the Court had taken issue with the Board’s interpretation of the term “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” The Board’s view had been that, even if a Section 2(11) function is exercised with a substantial degree of discretion, there is no “independent judgment” if the judgment was of a particular kind, namely “ordinary professional or technical judgment.” The Court found this to be clear error, and noted that it is the *degree* of discretion involved in making the decision, not the *kind* of discretion

exercised –whether professional, technical or otherwise – that determines the existence of “independent judgment” under section 2 (11) of the Act.

In addressing this basic question of what constitutes “independent judgment,” the Board first noted that a judgment is not “independent” if it is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority or in the provisions of collective bargaining agreements.” The Board said, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-patient ratio requirement. Nor would independent judgment be involved if a person were merely following strict seniority rules in assigning work.

The Board also noted that not all professional judgments are supervisory. Thus, a charge nurse who makes a professional judgment that a particular patient requires monitoring does not become a supervisor unless he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring function.

The Board explained that when an individual is engaged a part of the time as a supervisor, and the rest of the time as a unit employee, the legal standard for a supervisory determination is “whether the individual spends *a regular and substantial* portion of his/her work time performing supervisory functions. While the Board did not adopt a strict numerical definition of substantiality, it did note that it has found supervisory status “where individuals have served in a supervisory role *for at least 10-15 percent of their total work time.*”

On the specific aspects of supervisory status, the Board discussed the question of whether the charge nurses had authority in the area of work assignments. On the general question of what constitutes “assign,” the Board stated that “the ordinary meaning of the term “assign” is “to appoint to a post or duty.” It went on to say:

We construe the term ‘assign’ to refer to the act of designating an employee to a place (such as a location, department, or wing); appointing an employee to a time (such as a shift or overtime period); or giving significant overall duties, i.e. tasks, to an employee.

Second, the Board stated that the statutory phrase of “responsibly to direct” meant *direction that involved accountability*. Thus, either the employee giving direction could hold the employee given direction accountable for not complying (e.g. corrective action), or that the employee giving direction could be held accountable by a higher authority for the direction given.

Using this guidance, the Board found that the permanent (as opposed to rotating) charge nurses “assign” nursing personnel to patients. At the beginning of each shift, and as patients are admitted thereafter, the charge nurse assigns the staff working the unit to the patients they will then care for. The charge nurses’ assignments determine what will

be the required work for an employee during the shift, thereby having a material effect on the employee's terms and conditions of employment.

The Board noted that this assignment authority was also exercised with the use of independent judgment. The charge nurses make their assignments by choosing among the staff available. In the health care context, choosing among available staff frequently requires independent judgment and discretion.

Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse's analysis of an available nurse's skill set and level of proficiency at performing certain tasks and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.

Based on this, the Board found that the charge nurses must exercise a substantial degree of discretion sufficient to constitute independent judgment and make them supervisors under the Act. By contrast, charge nurses in the emergency room did not meet this level of discretion and were instead included in the unit since they did not make particular assignments of staff to patients and did not take into account patient acuity or nursing skills in making geographic assignments within the ER.

While the Board did not believe its decision represented a "sea change" in interpreting the Act, the dissent of Members Liebman and Walsh disagreed, claiming that the Board had in effect excluded thousands of professional employees from representation rights. The dissent took issue with what it believed to be a broad reading of "assign" in the majority's decision. The dissent would not have read the term "assign" to include task assignments, but only on the issues of determining an employee's position with the employer; designated work site; or designated work hours. In short, "it must be the *employees* who are assigned not the *tasks*." From the dissent's point of view, the assignment of tasks fits better under the question of whether the individual "responsibly directs" the employee.

On this latter question of what it means to "responsibly to direct," the dissent argued for a more limited definition, contending that it only occurs when 1) the person has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge" 2) is held accountable for the work of others; and 3) exercises significant discretion and judgment in directing his or her work unit. In essence, the dissent argued that the majority's ruling encompasses "workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."

Efforts were afoot in Congress this Spring to develop guidelines to determine the supervisory status of charge nurses in an effort to blunt or reverse the impact of the *Oakwood* decision. (See *Daily Labor Report*, BNA, 3/23/07).

E. 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.

[W]e take this opportunity to restate the legal standard to be applied in cases involving objections to an election based on supervisory prounion conduct.

When 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 prounion 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 prounion 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 *SNE Enterprises, Inc.* 348 NLRB 69 (2006), the Board found that leadperson's role in soliciting authorization cards constituted objectionable conduct that warranted setting aside the election. In this case, several leadpersons, each of whom supervised about 20 employees, directly solicited cards from some of their subordinates during a union drive at their window and door manufacturing plant. After the petition for an election was filed, three of the leadpersons continued to publicly support the Union, telling employees that the union would help them get better benefits and treatment from the employer, and that the union would secure just cause protection for them.

In setting aside the election, the Board followed the *Harborside* guidelines. The Regional Director below had not found objectionable conduct under *Harborside*, noting that: the leads had a lack of power to significantly affect the employees' working conditions; the employees did not perceive the leads as supervisors; in prior elections, leads had been eligible to vote; the employer specifically campaigned against the union.

But the Board did not believe this avoided a finding of coercion. The Board noted that collectively these leadpersons purposely targeted the vast majority of their subordinates. While these supervisors did not have any power of hiring and firing, they had the clear authority to assign and direct work and as such can impact broadly on their subordinates' work life. The leads campaigned here for an extensive period, well after the cards were filed, but even if solicitation of cards ceased after the petition was filed, such evidence, without more, is insufficient to negate the inherent coerciveness of the original solicitations. Employees who sign such cards may reasonably feel obligated to carry through on their stated intention to support the union, and the number of signed cards may paint a false portrait of employee support for the union.

While the employer did conduct an anti union campaign, the employer never disavowed specifically the actions of the leads in soliciting employees. Further, the fact that the leads were not deemed supervisors in prior elections is irrelevant to this case.

Finally, as to the impact of this conduct on the election, the election turned out to be very close, with the union winning 87-82 with three challenged ballots. More than 35 employees had been solicited by the leads. Further, the impact of their solicitation was not isolated to the 35 employees; it was widely known among the employees that some of the leads were active members of the union organizing committee. The lingering effect of their solicitation carried forth to election day.

F. Other Election Conduct

In *S.T.A.R., Inc. Lighting the Way*, 347 NLRB 008 (2006), the Board ordered that an election won by District 1199, SEIU at a health care facility be set aside. During the campaign, a union organizer gave a brochure to an employee that said, *inter alia*, "there is a one time \$50 initiation fee. Workers who organize to join 1199 are exempt, and begin paying dues once a contract is won." This left the impression that initiation fees would be waived only for those who supported the union before the election. At a later meeting with employees prior to the election, an organizer explained that there would be no initiation fee for anyone working at the facility before the union obtains a contract.

In analyzing this case, the Board noted that a union interferes with free choice when it offers to waive initiation fees for only those employees who manifest support for the union before an election. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). When a union makes an ambiguous offer to waive fees, it is the union's duty to clarify that ambiguity or suffer the consequences that might attach to employees' possible interpretations of the ambiguity. *Inland Shoe Mfg. Co.*, 211 NLRB 724 (1974).

In the hearing officer's view, the union's brochure in this case was certainly ambiguous and could have led employees to believe that only those active organizers and union supporters would have their initiation fee waived and that those who oppose the union or were neutral would not. However, the hearing officer believed the union satisfied its obligation to clarify the ambiguity. The Board disagreed.

The Board noted that everyone received the ambiguous brochure, either directly from union organizers or from the employer, who put the last page of the brochure in everyone's mailbox. However, the union never articulated its nonobjectionable waiver policy to those 136 eligible voters. Only 18 members attended the union meeting where the policy was explained.

The dissenting member of the Board in this case (Liebman) tried to argue that the employer should not benefit from the fact that it was the employer who placed the brochure in the boxes of all employees, thereby making sure that all employees were aware of the ambiguous statement. The union claimed it did not know about such dissemination. The Board majority, however, noted that the result should not depend on whether the party who engaged in the objectionable conduct knew about the dissemination of that conduct. The issue is not whether a party should be punished but rather whether the employees have been exposed to conduct that interfered with their free choice.

Thus, the critical facts in this case are that the Petitioner's brochure contained an objectionable statement, that the statement was distributed to 136 employees, and that the Petitioner did not, as required by Board precedent, clarify its policy for most of these employees. The fact that the Petitioner was unaware of the distribution and so arguably saw no need to clarify its policy is beside the point. The point is that the Petitioner's ambiguous fee-waiver statement reasonably tended to coerce a determinative number of employees in their election choice. Consequently, and to avoid sanctioning a tainted election result, we take into consideration the fact that all of the employees were exposed to the objectionable statement.

G. Use of E-Mail during Campaigns

In *Media Gen. Operations Inc. d/b/a Richmond Times Dispatch v. NLRB*, 4th Cir, No. 06-1023, unpublished opinion, 3/15/07, reported in DLR, 3/30/07, the Fourth Circuit Court of Appeals enforced a Board order against a newspaper company that barred employees from using the corporate email system to discuss union matters but did not bar the use of the system for other nonbusiness use. While the company did have a policy of barring all personal use of email, this policy was not enforced, and many employees routinely used the system for messages relating to charities, social events and personal matters without being disciplined. However, the policy was enforced selectively against those employees who sent emails dealing with union solicitation.

In a most important case for future organizing campaigns, on March 27, 2007, the question of whether employees have *any* right to use their employers' email systems to communicate with one another about unionization and related matters was argued orally before the NLRB in the case of *Guard Publishing Company, d/b/a The Register-Guard*, NLRB No. 36-CA-8743-1, as reported in *Daily Labor Report*, 3/28/07, BNA. The case arose when the company issued a memo indicating that the email system –along with its telephones, copying machines, fax machines and message machines – were not to be used for solicitation of any kind. When some employees used the email system for union-related matters, they were disciplined and charges ensued. The Administrative Law Judge for the NLRB had found that, since the company allowed the email to be used for personal matters, it was discriminating against employees who sent union-related emails.

The NLRB General Counsel urged the full Board to balance employees' rights under Section 7 with employers' business interests in regulating the use of emails and to accommodate both interests as much as possible. The General Counsel urged that any policy banning all nonbusiness e-mail use should be deemed presumptively illegal absent some showing of special circumstances. During the oral argument, one of the Board members noted that employers frequently monitor their email systems to prevent computer viruses and liability for illegal conduct and asked the General Counsel if such employers could be charged with illegal surveillance of employees' union activity. The General Counsel agreed that employers have that right to monitor email and that employees should have no expectation of privacy in email communication.

The union argued that the Board should hold that whenever an employer allows its email to be used for nonbusiness use, it must allow employees to use the email system to communicate about unions or other concerted activity. The union did acknowledge that employers may restrict such email communications to nonworking time. Union counsel was asked by one of the Board members about union email communications to employees, and he responded that it would be illegal discrimination for an employer to block emails from the union.

On the other hand, the company argued that the email system is the company's equipment and private property and that the company has the right to regulate and restrict its use and that there is no section 7 right to use it for non business purposes. The email system is private property and subject to legal prohibitions on trespass. Counsel for the company was asked whether an employee who sent an email complaining about wages to other employees would be in violation of the policy. He responded that that would not violate the policy because it would not be on behalf of an outside organization; it would not be solicitation. But if an email expressed an interest in getting a union, that becomes an email that is made on behalf of an outside organization and would be solicitation.

Hopefully, the various issues that the Board will examine in this case include:

1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any,

- may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?;
2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?
 3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by non-employees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?
 4. In answering the foregoing questions, of what relevance is the employee's workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?;
 5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a Section 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?;
 6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?
 7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?

H. 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, preemption cases continued to arise in the labor law sector. One case deserving of some attention is *Chamber of Commerce of the U.S. v Lockyear*, 437 F.3d 890 (9th Cir. 2006). This case had actually been heard before by the Court in 2005. In *Chamber of Commerce of the U.S. v. Lockyear*, 2005 U.S. App LEXIS 19208, 422 F.3d 973, (9th Cir, September, 2005), a three judge panel for the U.S. Court of Appeals

for the Ninth Circuit had originally 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” by subsidizing either side of the argument. 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 striking down the statute, the Court wrote:

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.²

But the 2005 decision by the three judge panel was not the final word, and it was withdrawn from publication. Instead, on January 17, 2006, the Court granted rehearing *en banc* in the case. And on September 21, 2006, the Court ruled that the law **did not** undermine federal labor policy and **was not** preempted by the NLRA.

In this case, the NLRB itself had filed an amicus brief urging preemption. The Board had argued that AB 1889 “works at cross purposes with such a policy [of employee free choice on the question of unionization] because it limits the flow of information to employees by regulating employer speech in an area – an organizational election – that Congress did intend to be controlled by the free play of economic forces.”

But the Court disagreed, noting that AB 1889 does not prohibit an employer from using non-state funds to express its opinions; it only restricts state grant and program funds from being so used. The Court said that this case does not involve what is referred to as “*Machinists*’ preemption.”³ That type of preemption occurs when a state seeks to regulate an activity that, while not expressly protected or prohibited by the Act, is an activity that Congress nonetheless intended to be controlled solely by the “free play of economic forces.” Since the Court found that election conduct is indeed regulated by the NLRB itself, through its decisional law, then election conduct cannot fall into that unfettered zone where the free play of economic forces trumps all state action. Moreover, California did not condition receipt of state funds on employers’ declaration of neutrality in union campaigns. Employers can take any position they want under this law. They just cannot use the state funds to advance their purposes. Accordingly, the Court found that preemption based on the *Machinists*’ case is not applicable here.

The Court also found that there was no *Garmon* preemption either.⁴ In this type, there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. *Garmon* thus protects NLRB jurisdiction over the conduct **expressly protected** or prohibited by the Act, while, by contrast, *Machinists* preemption concerns **conduct that Congress left to laissez-faire**. On this point, the Court again rejected arguments that the employers’ free speech rights, guaranteed by Section 8 (c) of the NLRA, and the First Amendment, have been infringed upon by AB 1889. That act did not limit employer free speech in any way.

² 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, at that time, the AFL-CIO secured a reconsideration of the case and the 2004 opinion was withdrawn.

³ So called based on the case of *Machinists v., Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) which delineated the principles.

⁴ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The three members of the Court who disagreed noted that “once the state has chosen to award a contract to the lowest responsible bidder, the state’s interest in the funds it pays for the contracted goods and services is at an end.... Simply because a business chooses to contract with the state does not mean that the state may abrogate First Amendment rights.... Free market choice or not, these employers retain their First Amendment rights to spend their own funds, as the undoubtedly earn by contracting with the state, as they see fit.”

Furthermore, the dissenters noted that the statute is clearly tilted in the unions’ favor; it is not as neutral as it appears. Rare is the employer that will use funds to *encourage* employees to unionize. Thus, by restricting the use of state funds, the state has taken a position in favor of unionization and has thus tilted the scales in an arena in which it did not belong. The statute strikes at the heart of employer free speech under section 8 (c) and should have been deemed preempted.

In contrast to *Lockyear*, however, the Second Circuit Court of Appeals in New York overturned a lower court ruling and held that a New York law restricting employers from using state money to encourage or discourage union organizing is preempted by the National Labor Relations Act. *Healthcare Association of NY Stat, Inc. v. Pataki*, (Case no. 05-2570, U.S. App. LEXIS 29857, December 5, 2006). That law, which had taken affect in December of 2002, provided that “no monies appropriated by the state for any purpose shall be used or made available to employers” for training managers regarding methods to encourage or discourage union activity or for participation in union drives; hiring attorneys, consultants, or contractors to engage in such activity; and paying employees whose principal job duties are to engage in such activities. The Court focused on section 8 (c) of the Act and noted that 8 (c) was meant to expand speech rights. Section 8 (c) “does protect employer speech in a unionization campaign context and can provide a basis for *Garmon* preemption.”

While the Court also felt that *Machinists’* preemption may be present as well, it stated that “the ultimate question depends on the same factors we considered relevant in our *Garmon* discussion: whether section 211-a burdens moneys that cannot properly be said to belong to the state (because they either belong to the contractors or to federal or local governments) and whether the State can accomplish its goal of saving money by limiting the kind of costs for which it will reimburse program participants. These questions in turn depend on disputed facts which cannot be decided on summary judgment.”

Put another way, the court noted that “to the extent that section 211-a functions as a restriction on what use may be made of State grants, it is not preempted by *Garmon*.” However, “to the extent that section 211-a imposes restrictions on the association’s and their members use of proceeds earned from state contracts and statutory reimbursement obligations in which the contractor’s labor costs cannot affect the amount of expense to the State, it attempts to impose limitations on the use of the association’s money rather than the State’s; it therefore deters employers from the exercise of their rights under section 8 (c) of the Act and satisfies the threshold conditions for *Garmon* preemption.”

Further, to the extent section 211-a might be interpreted to apply to funds that were originally appropriated by the federal government and only “pass through” the State en route to the contractors who earned the funds, it would exceed the State’s legitimate interest in controlling its own money.” For example, Medicare and Medicaid money might be said to simply pass through the state – and thus cannot be restricted by the State as to its use. However, the record was incomplete on this issue, and thus the court would not rule explicitly on this question. Ultimately, the case was thus remanded for further proceedings.

Other preemption cases are of interest over the past year. One such significant case was *Retail Industries Leaders Association v. Fielder*, a case involving ERISA preemption rather than NLRA preemption. The law in question is Maryland’s Fair Share Health Care Fund Act, which 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 argued 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 state of the argument, opponents claimed that the statute “relates” to a benefit plan because the natural consequence of the legislation will be for companies to modify their plans.

The District Court agreed that the law was preempted because the law effectively required employers to spend a minimum amount on health care benefit plans. It did not find that the act violated the Equal Protection Clause because the state’s classifications were not irrational. Both sides appealed to the Fourth Circuit.

On the preemption question, the Court observed first that ERISA did not mandate that employers establish specific benefit plans; it merely regulated such plans that an employer chooses to establish. The primary objective of ERISA was to “provide a uniform regulatory regime over employee benefit plans,” and to accomplish that, ERISA broadly preempts, by its own language, “any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan.” 29 U.S.C. Section 1144(a).

In applying this concept to the Maryland Act, the Court noted that any “reasonable employer” would not pay the State a sum of money that it could instead spend on its employees’ healthcare. Thus, the “only rational choice employers have under the Fair Share Act is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold. The Act thus fall squarely under *Shaw*’s⁵ prohibition of state mandates on how employers’ structure their ERISA plans.” In the Court’s view, then, the Act clearly has an “obvious ‘connection with’ employee benefit plans and is so preempted by ERISA. *Retail Industry Leaders Association v. Fielder*, _ F.3d _, 2007 WL102157 (4TH Cir., 2007).

In *George v. AT & T Corp.*, (D. Mass, 2006), the federal district court in Massachusetts held that a former AT & T employee’s state law claim that the company had misrepresented to her that workforce reductions were going to take place, thus inducing her to retire before she became eligible for severance pay was preempted by the National Labor Relations Act. In the opinion of the court, resolution of her state claim necessarily “depended on” the terms of the collective bargaining agreement between AT & T and the Communications Workers of America, and thus the case was preempted by Section 301 of the Act. The employee, who had worked 30 years with the company, claimed that prior to her retirement she asked the company if workforce reductions were planned. She was told no. But six weeks after she retired the company announced a large scale reduction and, had she still been employed at the time, she would have received 100 weeks of severance pay.

In finding preemption, the court agreed with the company that the issue of whether she was defrauded out of severance benefits was an issue arising from and governed by the bargaining agreement, and thus preempted by Section 301.

In *NLRB v. North Dakota*, (D. ND, No. 1:06-cv-064m 2/1/07), a federal district court ruled that a North Dakota law that required union-represented employees to pay a representation fee to the union if they choose not to join was preempted by the NLRA. North Dakota is a right to work state and employees cannot be forced to join the union. The legislature believed that employees who do not voluntarily join should be forced to pay a fee to the union and not be a “free rider.” If a union processes a grievance for a non-member, then “that labor union shall collect the actual representation expenses from the nonunion employee.” (ND Century Code, Section 34-01-14.1.

The NLRB filed an action requesting declaratory judgment that this law was preempted. The Board further argued that such a fee would have a “coercive effect on non member employees in the exercise of their right not to join” a labor union. The Court agreed with the Board. It noted that the law conflicts with Section 7 of the Act, since employees are free to refrain from all union activity if they choose. The effect of the legislation would be to “inject an agency fee requirement into every collective bargaining agreement written in this state.” Section 8 (b) (1) (A) of the Act makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of his or her Section

⁵ *Shaw v. Delta Air Lines*, 463 U.S. 85,91 (1983).

7 rights. By directing unions to collect fees from non-members, the Court noted, the law “requires unions to engage in conduct which is prohibited by the NLRA.”

I. Disloyalty and Section 7 Rights

A couple of cases from last year highlight the tension between reasonable employee loyalty to the organization and Section 7 concerted activity rights.

In *PHC-Elko Inc*, 347 NLRB 143 (2006), the Board dealt with a case of an organizing effort at a hospital among its service and technical employees. During the campaign, the employer held some small group meetings with employees in which employer representatives argued that employees did not need a union. The COO, Rick Kilburn, then noted that there had been rumors about substandard care at the hospital and that all employees should serve as “ambassadors and marketers” for the hospital and that such an effort would result in better conditions at the hospital and better working conditions for the employees. One employee, Wanda Pollard, stated that she would rather resign than say anything positive about the hospital. She then related to the group how poorly her husband had been treated when he was a patient. In the ensuing discussion, Kilburn asked her why she worked for the hospital if she felt so strongly about this.

Later in the conversation Kilburn was discussing the jail kitchen operation and whether it was profitable. Pollard said she didn’t want to work for the hospital; she wanted to work for the county. Kilburn said she would get her wish if the hospital did not retain its contract to operate the jail kitchen.

When Kilburn was done, he turned the meeting over to the hospital’s chief financial operator who began a presentation on the hospital’s patient census. At that point, Pollard stood up and said “come on, girls, we’ve got to cook the food for the prisoners.” Kilburn told Pollard to sit down, that he had not closed the meeting. Pollard said she didn’t have to, it was a free country, and she reported to the county sheriff anyway. After he ended the meeting, Kilburn told Pollard to stay after, at which point he fired her. In the follow up termination letter, Kilburn wrote: “During the mandatory employee meeting today, in front of several other employees, you consistently showed your nonsupport of working at Elko General Hospital and how you “want to go back to being county.” You also made comments about how you would not utilize Elko services due to a bad experience your husband had in the past, again showing no support for your employer. The last think you did was to dismiss the meeting yourself telling the employees that they all needed to get back to work.”

The General Counsel of the NLRB contended that she was fired for concerted activity. The administrative law judge found that Elko had indeed fired her for concerted activity. He noted that when Kilburn asked the employees to be ambassadors for the hospital and linked it to improved working conditions if they did, then he established a term and condition of employment. When Pollard protested, she was in essence criticizing the terms of her employment and was thus engaging in protected activity.

While the judge found her conduct rude, he did not find it sufficient egregious to overcome the finding that she had been discharged for concerted activity.

The Board correctly saw this as a mixed motive case. The Board began its inquiry by assuming *arguendo* that Elko had in fact established a new term of employment as the ALJ suggested, and that Pollard was engaging in protected activity in protesting that new term. The Board assumed *arguendo* that General Counsel met his burden of showing she was discharged for engaging in protected activity.

The Board then turned to the other two reasons for the discharge and examine whether, under the *Wright Line*⁶ analysis, the hospital would have fired her anyway. The two reasons were Pollard's attempt to shut down the meeting and undermine Kilburn's authority and that she advocated the demise of her own employer at the jail. She advocated that the county replace her employer in running the jail kitchen.

Clearly, an employer need not tolerate the disloyal actions of an employee who wishes to oust her own employer from its position as employer. In sum, we find that Pollard was lawfully discharged when she insubordinately attempted to call to a halt the respondent's meeting in direct defiance of the respondent's officials and when she called for the ouster of the respondent as the employer of the jail kitchen employees.

In *Endicott Interconnect Technologies v. NLRB*, 453 F. 3d 532 (D.C. Cir., 2006), the D.C. Circuit Court of Appeals reversed a Board decision involving the discharge of employee for disloyal remarks to the press following the sale of a company and its purchase by EIT. White was quoted in the newspaper as saying "there's gaping holes in this business," and that, with the recent layoff of 200 employees, there were "voids in the critical knowledge base for this highly technical business. White was called in to speak with one of the company's owners who expressed displeasure over his reported statements. He threatened to terminate White if it happened again; White understood and said he was "on board."

However, a couple of weeks later, White posted a message on a website that the newspaper maintained as a public forum for comment on EIT's acquisition of the local plant. Responding to an anti-union posting on the site, White wrote:

To Mr. House: Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site [sic] all the bad things about unions and ignore all the bad things IBM and EIT have done to the employees and their families and the community at large?..... This business is being tanked by a group of people that have no good ability to manage it. they will put it into the dirt just like the companies of the past that were "saved" by Tom Libous and George Pataki.The union is the beginning of a community standing up for itself. It's time is now.

⁶ *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F. 2d 899 (1st Cir., 1981), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

The Board found that White's comments were all protected and that his discharge violated the Act.

The Court first referenced *NLRB v. Electrical Workers (Jefferson Standard)*, 346 U.S. 464 (1953), where the Supreme Court articulated the standard for determining whether an employee's actions are protected under section 7. The Court said that when an employee attacks his employer, whether or not he is engaged in concerted activity, the attack will deprive the employee of section 7 protection if it constitutes "insubordination, disobedience or disloyalty." In subsequent cases, the Board formulated a two part test under which an employee's communication to a third party is deemed protected under section 7 if, first, it is related to an ongoing labor dispute, and, second, it is "not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Am. Golph Corp*, 330 NLRB 1238 (2000) (*Mountain Shadows*).

In this case, the Court believed the Board misapplied these standards. The Court noted that, in the first newspaper interview, "the damaging effects of the disloyal statements, made by an experienced insider at a time when EIT was struggling to get up and running under new management, is obvious from the immediate reaction of IBM's vice president" who telephoned one of EIT's owners because he was concerned about EIT's ability to supply IBM's circuit board needs. But even after the company gave White a second chance, he immediately posted a message saying that the current management was causing the business to be "tanked" and that it was going "to put it into the dirt." The depth of this disloyalty under these conditions allowed the company to discharge White without running afoul of the NLRA.

J. Bargainable topics

In *Trustees of the University of Illinois v. Illinois Labor Relations Board*, (Docket No. 101450, 101508, 101542, 101558, January 19, 2007), the Illinois Supreme Court ruled that a union's proposal on parking arrangements for personal vehicles was a mandatory subject of bargaining under the Illinois Educational Labor Relations Act (115 ILCS 5/14(a)(1), (a)(5)). Using a three part analysis, the Court found that parking was, first of all, "an issue of wages, hours and terms and conditions of employment." Second, that parking regulations were not a matter of "inherent managerial authority" residing at the "core of entrepreneurial control." Third, since parking was not a matter of inherent managerial authority, the court did not need to reach the third part of the test, which would have been a balancing between the benefits that bargaining would have on the decisionmaking process with the burdens that bargaining would impose on the employer's authority."

In *Prof'l Staff Congress-CUNY v. NY State Pub. Employment Relations Bd.*, 857 N.E.2d 1108 (N.Y. 2006), the Professional Staff Congress ("PSC"), the certified collective bargaining representative of instructional and administrative employees of City University of New York ("CUNY"), argued that CUNY refused to bargain over an

intellectual property policy. In 1972, prior to the first CBA with PSC, CUNY adopted an intellectual property (“IP”) policy addressing ownership of copyrights and patents, the payment of royalties, and other issues related to intellectual property developed by CUNY employees. The IP policy was never a subject of collective bargaining between PSC and CUNY, and was never incorporated into any of the CBAs. When the parties began negotiating a new CBA, CUNY simultaneously began the process of amending its IP policy. PSC demanded negotiation over the IP policy, but CUNY declined to negotiate it, asserting that Article 2 of the expired CBA, authorizing the CUNY Board of Trustees to alter existing bylaws or policies respecting a term or condition of employment not inconsistent with the CBA without PSC’s approval, constituted a waiver by the union of the right to negotiate particular items, including the IP policy. CUNY argued that the Article 2 waiver remained in effect during negotiations for a successor agreement, and precluded the union from demanding that CUNY collectively bargain for modifications to the IP policy.

PSC filed an improper practice charge with the State Public Employment Relations Board (“PERB”), claiming that CUNY’s refusal to negotiate modifications to the IP policy was an improper practice under Civil Service Law § 209-a(1)(d), requiring parties to negotiate in good faith. The charge was not resolved at the time, because the parties reached agreement on a new CBA, and PSC withdrew its proposal concerning the IP policy along with all of its other outstanding bargaining demands. Prior to the expiration of the new CBA, PSC demanded that the parties begin collective bargaining for the successor agreement by discussing the IP policy. CUNY again asserted that Article 2 of the CBA constituted a waiver by the union of the right to collectively bargain changes to the IP policy. CUNY subsequently adopted a new IP policy and PSC filed an amended improper practice charge reasserting the claim previously filed with PERB. After a hearing, an administrative law judge agreed with CUNY that the union waived its right to bargain over the IP policy in Article 2. However, the ALJ also held that the waiver expired when the CBA expired, and therefore CUNY’s refusal to bargain for the policy after the expiration of the CBA was an improper practice. Both parties appealed to PERB, which upheld the ALJ’s decision that PSC had waived the right to negotiate certain subjects, including the IP policy, under Article 2. Unlike the ALJ, PERB held that the waiver remained in effect after the expiration of the CBA pursuant to the Triborough Amendment, which provides that all terms of an agreement are deemed to continue after the expiration of the CBA. PSC challenged PERB’s ruling and the Appellate Division reversed, holding that CUNY had committed an improper practice when it refused to negotiate the IP policy. The Appellate Division reasoned that bargaining waivers should not be interpreted to survive a CBA absent an express provision to that effect, and although employers are required to continue all the terms of an expired CBA, no reciprocal duty is imposed on employees.

The Court of Appeals of New York first concluded that PERB reasonably interpreted Article 2 as a waiver by PSC of its right to demand negotiation concerning matters not addressed in the CBA, including the IP policy. The court examined the language of Article 2, which specifically granted CUNY the right to make unilateral decisions concerning the alteration of bylaws, policies and resolutions concerning a term

or condition of employment. Article 2 further provided that PSC's consent to the Board's action was not required prior to such action being taken or becoming effective, unless the action was inconsistent with a stated term of the CBA, and as long as PSC received notice and an opportunity to consult. The court stated that the IP policy fell within the purview of Article 2 since it was never made part of the CBAs between PSC and CUNY and its alteration did not conflict with any term of the CBA. Therefore, CUNY was not required under the CBA to obtain PSC's consent to any change in the policy, nor was it obligated to negotiate modification of the policy with the union.

Next, the court analyzed whether the Article 2 waiver remained in effect after the expiration of the CBA. The court upheld PERB's conclusion that the waiver did remain in effect based in part on Civil Service Law § 209-a(1)(e), requiring an employer to continue all the terms of an expired CBA while a new agreement is being negotiated, and PERB's longstanding practice requiring employers to continue the terms and conditions of employment to maintain the status quo during collective bargaining for a new agreement. PERB interpreted the law as imposing reciprocal obligations on both the employer and employee, and in cases in which members of a bargaining unit changed the status quo after expiration of a CBA, PERB concluded that the employer was free to do the same and could not be charged with an improper practice for altering the terms and conditions of employment. Further, the court noted that the legislative history of the law indicates that it was intended to enhance the negotiating process by preserving the status quo until the parties can reach a new agreement and enacted into law what had become standard practice. Thus, the practical effect of continuing all the terms of a CBA during the status quo period is that mutual obligations are imposed on both employers and employees, which is consistent with the statute and PERB's long standing application of the Triborough doctrine.

Finally, the court upheld PERB's determination regarding CUNY's negotiations in good faith. In resolving PSC's claim that CUNY failed to negotiate in good faith, PERB assessed whether CUNY was required to collectively bargain the intellectual property policy by reviewing the parties' CBA, bargaining history, and past practices in light of established PERB precedent. The court specifically rejected PSC's assertion that a waiver provision should be deemed to expire at the conclusion of the CBA unless the parties include language indicating otherwise, as inconsistent with PERB precedent and Civil Service Law § 209-a(1)(e) because, under the statute, the assumption is that all terms of a CBA remain in effect during collective bargaining of a successor agreement. The court stated that a concern that this practice would result in a waiver in perpetuity was unfounded because the waiver itself was a mandatory subject of negotiation and the union was free to change or eliminate that language in the collective bargaining process. The court noted that because the Article 2 waiver was the subject of collective bargaining, it was not more likely than any other term of the parties' CBA to continue in perpetuity. In addition, the court noted that PERB has long held that parties can effectively prevent certain terms of a CBA from being continued after expiration of the contract by using language that causes the term to expire at the conclusion of the CBA or at some other point in time. Here, PSC and CUNY knew how to include a sunset clause

in a contractual provision that they did not wish to carry into the status quo period as they had inserted such clauses into prior agreements.

Also dealing with intellectual property is the case of *Pittsburgh State Univ./Kansas Nat'l Educ. Assoc. v. Kansas Bd. of Regents/Pittsburgh State Univ. and Pub. Employee Relations Bd.*, 280 Kan. 408 (Kan. 2005). In 1997, the Kansas Board of Regents/Pittsburgh State University ("KBR") proposed a policy dictating that KBR retained ownership and control of any intellectual property created by faculty at Pittsburgh State University ("PSU"). The Pittsburgh State University/Kansas National Education Association ("KNEA"), the recognized employee organization of certain PSU faculty, rejected this policy as unacceptable, proposed its own policy, and insisted that the parties negotiate the matter. KBR responded by stating that it was not required under the Public Employer-Employee Relations Act ("PEERA") to negotiate the policy because the subject of intellectual property rights was not a condition of employment, was preempted by federal and state law, and was a management prerogative. KNEA filed a complaint with the Public Employee Relations Board ("PERB"), and while the complaint was pending, KBR formally adopted a different intellectual property policy giving some intellectual property rights to employees of KBR's institutions, without meeting and conferring with KNEA. KNEA amended its complaint to allege that KBR's unilateral adoption of this policy was also a prohibited practice. The essence of the complaint was that KBR had an obligation to meet and confer before adopting a policy regarding ownership of intellectual property.

Under PEERA, KBR, a public employer, is required to meet and confer with KNEA, a recognized public employee organization, only if ownership of intellectual property is a condition of employment. If the ownership of intellectual property is a condition of employment, the subject may be included in a memorandum of agreement if no exception applies, i.e., if ownership of intellectual property is not preempted by state or federal law, is not a right of a public employee, or is not a right of a public employer. From the time KBR proposed the intellectual property policy and KNEA objected to it, KBR argued that ownership of intellectual property was not a condition of employment and that, even if it was, it could not be included as a subject in a memorandum of agreement because the subject was preempted by statute and fell within the rights of the public employer. As such, KBR asserted that it had no obligation to meet and confer with KNEA and, therefore, did not commit a prohibited practice when it implemented the policy.

PERB determined that there was no obligation to meet and confer because federal and state law preempted the subject of intellectual property. The PERB hearing officer assumed that the subject of intellectual property rights intimately and directly affected the work and welfare of the public employees at issue here, without deciding that question. He also declined to decide the application of the exception regarding the public employer's rights, as he determined first that federal and state laws were preemptive. He focused solely on copyright law to find that the subject of intellectual property rights was preempted by operation of federal law, and found that state law mandated that any funds

received by a state educational institution or its employees from intellectual property be dedicated solely to the use of that institution. He concluded that the disposition of funds received from intellectual property was statutory, and therefore not a mandatorily negotiable condition of employment. PERB reviewed the decision and upheld the hearing officer's initial order and decision. The district court reversed PERB's decision, concluding that intellectual property constitutes a condition of employment, and that the requirement to meet and confer on the subject of intellectual property did not violate Kansas law or in anyway impermissibly affect any inherent managerial policy. The court also opined that the subject was not preempted, noting that all intellectual property is not preempted by federal law and that the hearing officer relied solely upon copyright law, and concluded that KBR committed a prohibited practice when it refused to negotiate. The court of appeals reversed the district court and reinstated the decision of PERB, holding that requiring mandatory negotiations concerning intellectual property is preempted by federal copyright law.

In reversing the lower court's decision, the Supreme Court of Kansas first examined the Appeals court's interpretation of the preemption exception. The court stated that the issue was not whether federal legislation occupied the field to the exclusion of a state statute, as such an interpretation is inconsistent with the language and purpose of PEERA. Rather, the court stated, the appropriate inquiry was whether federal law prevented the parties from negotiating regarding ownership of intellectual property rights and entering into a memorandum of agreement which included that subject. If the freedom to contract remained, the subject of ownership of intellectual property rights was not preempted. The court examined copyright law and the work-for-hire doctrine which provides that "[t]he employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." The court held that the plain language of the statute reflects that Congress clearly contemplated that parties could negotiate ownership of a copyright, and allows the subject of copyright ownership to be covered within a memorandum of understanding or any other written agreement. The court stated that at most, 17 U.S.C. § 201(b) gave the bargaining power to KBR in those situations where the work-for-hire doctrine applied to ownership of a copyright, however, did not foreclose negotiation regarding ownership. The court determined that an employer is never required to "negotiate away rights" under PEERA, and rather than negotiating away rights, KBR and KNEA would be negotiating consistent with the parties' expectations. Although this could mean that KBR would maintain ownership rights, KBR could also determine that it does not always have ownership rights or is willing to contractually grant those rights to the faculty, as 17 U.S.C. § 201(b) does not prevent the parties from entering into a memorandum of agreement regarding the subject of intellectual property rights.

The court next held that the Appeals court, the hearing officer, and PERB erred in assuming that the work-for-hire doctrine would apply to any intellectual property created by PSU faculty simply because those faculty members were employees of PSU. The court reasoned that while it was not clear that there is an absolute teacher exception to the work-for-hire doctrine as argued by KNEA, whether any particular creative work of a

faculty member constitutes work for hire depends on whether the work is the type of work the faculty member was hired to create; whether it was created substantially within the time and space limits of the job; and whether it was motivated by a purpose to serve the University employer, necessarily involving not just a case-by-case evaluation, but potentially a task-by-task evaluation.

Further, in response to KNEA's argument that the previous decisions in this case only addressed copyright and not other types of intellectual property, the court held that, as with federal copyright law, federal law regarding patent ownership does not prevent the parties from entering into a memorandum of agreement regarding the subject of patent ownership. To the contrary, the Patent Act specifically provides that the parties may assign patent ownership rights. Thus, the court concluded that federal law did not preempt any kind of intellectual property rights from becoming the subject of a memorandum of agreement under PEERA.

The court next held that PERB erroneously interpreted the law in concluding that, under state law, the disposition of funds received from intellectual property was fixed by state statute and was therefore not a condition of employment. The court stated that state law only governs whether monies received for a particular state education institution are dedicated to that specific educational institution, and does not govern whether monies received by an educational institution's employees for the sale of intellectual property belong to the educational institution or the employee. As such, the court concluded that neither state nor federal law preempted the subject of ownership of intellectual property from being the subject of negotiations between a public employer and a recognized public employee organization or being included within the scope of a memorandum of understanding.

The court next addressed whether intellectual property rights were a condition of employment under PEERA. The court stated that the district court was authorized to determine whether PERB had erroneously interpreted and applied the law to the facts of the case. The court noted that the hearing officer did not make all findings regarding facts about conditions of employment and failed to balance whether an item is significantly related to an express condition of employment, and whether negotiating the item would not unduly interfere with management rights reserved to the employer by law, to determine if the item is mandatorily negotiable. According to the court, the district court should have remanded the case to PERB for additional findings regarding whether ownership of intellectual property is a condition of employment and whether the exception of public employer rights in PEERA applied. As a result, the court remanded this issue to PERB for further proceedings.

II. Arbitration

In *Luzerne County Commissioners College*, 2007 WL 79233 (Pa. Comm., 1/4/07), a commonwealth court in Pennsylvania found that an arbitrator did not exceed his authority by awarding a promotion to a faculty member when the college failed to answer his

grievance over the denial in a timely fashion. The collective bargaining agreement in play had a provision in the Grievance Article that read: “If a grievance is not responded to by the President or his/her designee within the time frame prescribed in this Section, then said grievance will be deemed resolved in favor of the grievance and/or the Association.” Under the contract, the President had ten working days following the receipt of the written grievance to file his or her answer. In this case, the assistant professor who was denied promotion grieved under the CBA. He met with the President of the College, along with his union representative, to discuss the grievance. A written response was due by September 9, 2004. When the union did not hear from the President by September 15, it contacted the President and told her that the union considered the matter resolved in the grievant’s favor and that they expected an official letter notifying him of promotion.

The arbitrator ruled in favor of the union, noting that the language of the contract was clear and unambiguous and that since no answer was filed by the President, the union wins. On appeal, the college argued that since the president had discussed the matter with the union earlier, there was no need for a formal answer. The arbitrator had disagreed in light of the clear language of the contract and the court upheld his interpretation. The college also argued that the arbitrator had no authority to grant promotion and only the trustees could do that. However, since the promotion procedure is within the four corners of the CBA, an arbitrator would have authority to grant promotion. Moreover, since the Board of Trustees had signed the CBA, including the language about automatic resolution of the grievance in the union’s favor if a timely answer is not filed, the Board itself had recognized that promotion might be granted in a case like this as a remedy by an arbitrator.

In *Slippery Rock University v. Ass’n of Penn. State College and University Faculties*, 2007 Pa. Commw. LEXIS 12, 181 L.R.R.M. 2377 (Pa. Commw. Ct. January 16, 2007), the Association of Pennsylvania State College and University Faculties (“APSCUF”) was signatory to a contract with the State System of Higher Education (“SSHE”), of which Slippery Rock University (“the University”) is a part. The CBA allowed limited grievance rights to a faculty member who had been denied tenure. Under the CBA, the decision to grant tenure was to be based on a faculty member’s performance in three areas: teaching effectiveness; scholarly growth; and service to the University and community. The University had a policy with the local APSCUF chapter providing that if there was a conflict between the Local Agreement and the CBA, the CBA would apply. The Local Agreement stated that the tenure candidate must assume the burden of providing substantial evidence that the departmental performance review categories have been met, that it is the University president’s ultimate responsibility for the tenure process, and that the president must ensure that all judgments are sustained by sufficient and appropriate evidence. The president also must not employ criteria other than those used by the departmental and University-wide tenure committees.

The Grievant became employed as an Assistant Professor of Computer Science at the University in 1999. As a probationary faculty member, Grievant’s performance was evaluated annually, pursuant to the terms of the CBA. According to the annual evaluations, Grievant’s efforts to engage in scholarly growth were considered adequate

by some University evaluators but lacking by others. When Grievant became eligible for the tenure application process, she submitted an application for tenure which included an enumerated list of seven scholarly growth activities. The Chairperson of the Computer Science Department and the Departmental Committee both recommended the Grievant for tenure, and noted her accomplishments in the area of scholarly growth. The University-wide Tenure and Sabbatical Committee (UTSC) reviewed the recommendations of the Chairperson and the Departmental Committee, as well as the annual evaluations from the Grievant's first four years of employment at the University. Despite the recommendations for tenure by the Chairperson and Departmental Committee, the UTSC voted to recommend the denial of Grievant's application for tenure based on inadequate scholarly growth. The Provost reviewed the tenure application and the recommendations, and as a result of the conflicting recommendations, contacted the Dean of the College and another professor in the Computer Science Department in order to get more information about the Grievant. The Provost also met with Grievant and permitted her to provide additional information about her scholarly endeavors. Ultimately, the Provost recommended to the University president that Grievant be denied tenure, and the president denied Grievant's tenure accordingly.

As a result, APSCUF field a grievance on Grievant's behalf pursuant to the CBA. The grievance was denied at all levels, and an arbitration hearing was held. The Arbitrator determined that the president violated the terms of the CBA and ordered that Grievant be reinstated and deemed eligible for reconsideration for tenure. Subsequently, the University filed a petition with the court challenging the award of the Arbitrator. The University asserted that the Arbitrator's award failed to draw its essence from the CBA, and that the Arbitrator applied the incorrect burden of proof and used his own criteria to evaluate Grievant's tenure application rather than the criteria that was bargained for and agreed to by the parties. Although both parties agree that the CBA did not expressly state which party bore the burden of proof in a grievance procedure involving tenure, the University argued that the Arbitrator violated the essence test when he applied the incorrect burden of proof, misapplied precedent, and that the language of the CBA could not be rationally interpreted to allow for the burden of proof applied by the Arbitrator.

In reaching a decision, the Arbitrator reviewed several arbitration cases to determine the appropriate analysis to apply in the absence of a specified standard or burden of proof in the CBA. The Arbitrator relied upon two previous arbitration decisions concerning the denial of tenure of faculty members at other universities in the SSHE system. The University argued that according to the first arbitration decision relied upon, the standard applicable to a denial of tenure case is whether the Arbitrator finds that the University acted in a manner that was arbitrary and capricious. Further, the framework established in the second decision is essentially a just cause standard because it required the University to first establish a sound, reasonable basis for the decision denying tenure and then required Grievant to establish why that decision should be disturbed. APSCUF disagreed with the University's assertion that the Arbitrator applied a just cause standard of review, arguing that the Arbitrator merely accepted the framework established in the second decision relied upon. APSCUF further contended that the Arbitrator applied the framework and concluded, after reviewing Grievant's work history

and scholarly growth, that there was no basis for the UTSC's finding that Grievant lacked responsiveness to areas of improvement that had been suggested to her, and that the President's description of Grievant's scholarly growth as lacking was contrary to the record. Based upon those findings, he concluded that the University failed to meet its burden of establishing a sound, reasonable basis for denying tenure to Grievant. Because the University failed to carry the burden, the Arbitrator held that no further inquiry was required. APSCUF averred that this did not mean that the Arbitrator applied a just cause standard, rather that the University failed to satisfy the first part of the two-part test.

The court vacated the award and remanded the case to the Arbitrator for further proceedings consistent with its opinion. The court stated that the analysis applied by the Arbitrator in this case was not rationally derived from the CBA, and therefore, the decision failed to meet the requirements of the essence test. The court reasoned that the CBA was silent as to the burden of proof and the standard of review to be applied in denial of tenure cases. However, the Local Agreement, executed by the University and the local APSCUF unit, set forth the burden of proof when a candidate applied to the University for tenure, providing that the tenure candidate must assume the burden of providing substantial evidence that the departmental performance review categories have been met. Further, the Local Agreement provided that if there was a conflict between it and the CBA, the CBA was controlling. The court stated that no conflict existed, as the Local Agreement merely provided a burden of proof where the CBA was silent, and the Arbitrator should have looked to the Local Agreement to supplement the terms of the CBA. Therefore, pursuant to the Local Agreement, in a proceeding to challenge the denial of tenure, Grievant bore the burden to establish that there was substantial evidence that she met the departmental performance review categories for tenure. The court concluded that in light of the Local Agreement and the CBA, the Arbitrator wrongly placed the burden of proof on the University to establish that it had reasonable and sound basis for denying tenure.

III. Shirts and Free Speech

Two interesting cases arose last year on employees wearing shirts and their connection to free speech. The first case is *Montle v. Westwood Heights School District*, (E.D. Mich., No. 05-10137, 6/15/06). In this case, a federal judge determined that a high school teacher who wore a pro-union shirt into the class room was not engaged in protected expression under the First Amendment. Montle, a probationary teacher, and other teachers, wore bright green T-shirts with the initials of the union on the front, and the slogan "Working without a Contract," emblazoned on the back. When his four year probationary term ended, the school district refused to renew his contract and grant him tenure. He sued, claiming that the decision was in retaliation for his exercising his First Amendment rights.

The Court cited the Supreme Court's recent ruling in *Garcetti v. Ceballos*, 126 S. Ct, 1951 (2006) and observed that the Court had noted that a government entity has greater freedom to restrict free speech when it is acting in its role as an employer, "but the

restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.”

While the Court agreed that in this case, Montle's “speech” touched a matter of public concern, it found that the interest of the employee did not outweigh the employer's interest in promoting the efficiency of its public service. Montle had upbraided his co workers who did not wear the shirt and his confrontational behavior prompted complaints to the principal by other teachers. Under those circumstances, the teacher's right to free speech was outweighed by the school's “interest in ensuring professional demeanor and good relations among its faculty.”

In the second case, the Sixth Circuit rejected the claims of three Kentucky parks employees who were fired for refusing the tuck in their shirts as required by a new dress code. The court found that their untucked shirts did not amount to speech on a matter of public concern; that the revision of the dress code without prior notice did not violate their right to due process; and that the new policy's disparate impact on manual laborers did not violated their right to equal protection.

The new policy stated that all parks employees who have contact with the public are required to “maintain a professional, business like appearance,” and also prohibited visible tattoos and body piercings that are offensive or not consistent with the mission of the department. In an interpretative memo, the parks director sent an email to managers spelling out more specific standards, including a flat prohibition on body piercing, except for earrings; all visible tattoos and required the tucking in of all blouses and shirts. The day after this was issued, the department discharged three workers who refused to tuck in their shirts. Another employee was fired for not covering his tattoo that said “USN” – he had previously served in the Navy.

While the judge found no matter of public concern on the question of tucking in your shirt, he thought the tattoo issue was a bit closer because it arguably expressed his support for the U.S. Navy. But the employee's refusal to tuck in his shirt provided the parks department with an independent reason for termination anyway. *Roberts v. Ward*, No. 05-6305, 6th Cir., 2006).

IV. Legislation – H. 800 and related matters

On March 1, 2007, the House of Representatives passed H.800, a bill that, among other things, would allow a union to become certified without an election by having an NLRB card check procedure instead. A union that was able to produce signed authorization cards from a majority of those workers in an appropriate unit could file a petition with the Board and become certified after an NLRB check of the cards. IN addition, the legislation would require binding arbitration for first contract negotiations if the parties failed to reach an agreement within 90 days of the union being certified and following a 30 day attempt at mediation. The results of arbitration would be binding on the parties for two years. The House vote was 241-185.

On March 30, 2007, Senator Ted Kennedy (D-Mass.) filed legislation (S. 1041) that would give workers the right to form a union through the same card check procedure. This bill is identical to the House bill. The measure had 46 co-sponsors, well short of the 60 needed to end an anticipated Republican filibuster of the bill. In sponsoring the bill, Senator Kennedy said that “Unscrupulous employers routinely break the law to keep unions out – they intimidate employees, harass them, and discriminate against them. They shut down whole departments –even entire plants- to avoid negotiating a union contract. It’s illegal and unacceptable.”

In contrast, Senator Michael Enzi (R-Wyo) said he opposed the bill as it would take away workers’ free speech and the right to a secret ballot election. “This proposal is a shameless attempt to rob workers of their most fundamental right – the right to a private ballot – in order to bolster declining union membership.” The measure would open employees to pressure, intimidation, and coercion by co-workers and labor union leaders.

While union advocates point out that many elections are delayed due to management “stalling” tactics, the NLRB General Counsel’s Report on FY 06 operations for the Board showed that initial elections in union representation cases were conducted in a median of only 39 days from the filing of the petition, with 94.2% of all elections conducted within 56 days. (3643 representation cases total). Over 91% of those were conducted by agreement of the parties.

Similar initiatives have been undertaken at the state level as well in allowing public employee unions to be certified without an election, and seven states currently allow for some or all of its public employees to be unionized without an election.⁷

Perhaps even more consequential in the federal bill is the provision calling for binding arbitration in first contract situations. If the parties do not reach an agreement on a first contract within 90 days of a request to bargain, either party can call in the Federal Mediation and Conciliation Service. If FMCS fails to resolve the dispute within 30 days, it will appoint an arbitrator who will issue a binding decision as to the disputed issues of the contract. Such decision would be binding for two years on both parties, unless extended by agreement.

The fundamental principle of labor law since the 1930s is that the parties should be free to bargain in the arena of free enterprise without third parties mandated the provisions of any collective bargaining agreement. The pending legislation would force agreements through third party decision in the critical first collective bargaining agreement situations if settlement isn’t reached in a very short period of time.

⁷ The seven card check majority states are Connecticut, Kansas (Teachers only), Minnesota, Nevada, New Jersey, Oklahoma (Municipal Employees only) and Washington. A similar bill is pending in the Vermont legislature. Many other states allow voluntary recognition by an employer but in these seven states, a union can insist on such recognition even if management wants a secret ballot election for the employees. A similar bill is pending in the Vermont legislature.

Finally, the bill would increase penalties on employers who engage in discriminatory or coercive conduct during a union organizational campaign, or while the first contract is being negotiated. An employee could receive treble damages in back pay situations, as well as management paying up to a \$20,000 civil penalty for each violation.

V. Same Sex Marriage and Related Matters

So far, there is still but one state that recognizes same sex marriages. In 2003, the decision *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003) was issued where the Supreme Judicial Court of Massachusetts 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, and since then some 6500 couples have been married in the state.

At the present time, over half the states have amended their constitutions to bar same sex marriages, and there are legislative and/or ballot initiatives in 11 other states seeking to put constitutional gay marriage bans on the ballot in 2008, including Massachusetts. On the other hand, there are pending bills in California, Illinois, Massachusetts, New York, New Jersey, Rhode Island, Vermont, and Washington to legalize gay marriage. Civil union or domestic partnership bills are pending in nine states.

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.⁸ A few recent cases involving the question of same sex marriage include:

NEW JERSEY: *Lewis v. Harris*

The New Jersey Supreme Court held that the legislature must provide full rights and responsibilities to gay couples as heterosexual couples, either via civil unions or marriage. The court ruled that same-sex couples and their families have a constitutional right to the same benefits and protections that other New Jersey families take for granted. It ordered New Jersey's Legislature to provide these benefits and protections to same-sex couples. The Legislature can do this by amending its marriage laws to include same-sex couples, or it could enact a system, such as one that provides for civil unions, to extend equal benefits to same-sex couples. New Jersey already has a domestic partner law that provides certain protections to couples. The court gave the Legislature 180 days to adopt the necessary legislation.

⁸ The gay rights organization Lambda Legal has an excellent summary of national activity in this area on their web site. www.lambdalegal.org.

In its ruling the Court said:

In light of plaintiffs' strong interest in rights and benefits comparable to those of married couples, the State has failed to show a public need for disparate treatment. We conclude that denying to committed same-sex couples the financial and social benefits and privileges given to their 57 married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose.

We are mindful that in the cultural clash over same-sex marriage, the word marriage itself -- independent of the rights and benefits of marriage -- has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.

Our decision today significantly advances the civil rights of gays and lesbians. We have decided that our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. Now the Legislature must determine whether to alter the long accepted definition of marriage.

Subsequently, the New Jersey Legislature passed a civil union law to comply with this ruling. As such, New Jersey followed the same process as Vermont, which also established civil unions a number of years ago in response to a state Supreme Court ruling.

WASHINGTON: *Andersen v. Sims* Upheld the state's exclusion of same sex marriages. The ruling, a 5-4 decision that upheld the Defense of Marriage Act (DOMA), was handed down on July 26, 2006. The majority ruled that the DOMA does not violate the state's constitution and that the will of the legislature or the people through a ballot initiative measure process could revoke the controversial law.

In the plurality opinion, the Court wrote:

Limiting marriage to opposite-sex couples furthers procreation, essential to the survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents.

NEW YORK: *Hernandez v. Robles*. Decided in July 2006, the decision upheld the state's exclusion of same sex couples from marriage. As with the Washington court, the decision emphasized that only the legislature could extend marital privileges to same sex couples.

NEBRASKA: *Citizens for Equal Protection, Inc. et al v. Governor Michael O. Johanns et al.* Decided in July 2006 by the U.S. Circuit Court for the Eighth Circuit, essentially upheld the state's constitutional amendment that bans all relationship recognition-type protections for same sex couple.

CALIFORNIA: *Woo v. Lockyear* . In December 2006, the state high court agreed to hear an appeal of the case asking that same sex couples be allowed to marry. Case argued during the past couple of weeks. Note: currently California grants full in-state marital benefits by allowing same sex couples to register as domestic partners.

IOWA: *Varnum v. Brien*. Trial date set for July 2007 on whether same sex couples can marry in Iowa.

CONNECTICUT: *Kerrigan v. State of Connecticut*. On appeal to high court on whether same sex couples can marry in Connecticut.

MARYLAND: *Conaway v. Deane and Polyak*. On appeal to high court on whether same sex couples can marry in Maryland.

MASSACHUSETTS: *Cote-Whitacre et al v. Dept Public Health*.

On September 29, 2006, Massachusetts Superior Court Justice Thomas Connolly rules that there is no explicit prohibition in Rhode Island law preventing same sex couples from marrying, and therefore Rhode Island same sex couples were free to come to Massachusetts to marry. On the other hand, since New York had specifically ruled against same sex marriage, New York same sex couples could not be married in Massachusetts.